

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

UNITED STATES OF AMERICA Government,	(	3:04-CR-00240-P
VERSUS	)	DALLAS, TEXAS
HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT et al. Defendant.	(	August 27, 2008
	)	10:00 a.m.

TRANSCRIPT OF TELEPHONE STATUS CONFERENCE  
BEFORE THE HONORABLE JORGE A. SOLIS  
UNITED STATES DISTRICT JUDGE

## APP E A R A N C E S:

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10:06:46 1 THE COURT: There is a court reporter now.  
2 MR. CLINE: Then we're all set.  
3 THE COURT: We're good to go. She's already  
4 typing.  
5 MR. CLINE: Okay. Good.  
6 THE COURT: We're on the record.  
7 All right. Ms. Shapiro.  
8 MS. SHAPIRO: Yes.  
9 MR. JACKS: Mr. Jonas is going to do most of the  
10 talking for the government now, and Ms. Shapiro may jump in  
11 if necessary.  
12 MR. JONAS: I think your Honor's order on the  
13 discovery sort of mooted out some of the government's  
14 concerns on a practical level. I believe I understand where  
10:07:16 15 Mr. Cline is coming from saying that there is still an issue  
16 that is outstanding, but I think for all practical matters  
17 the issue has been filed. In a sense the way the CIPA notice  
18 is framed they're going to defense claims that they're going  
19 to reach the names of witnesses during the course of the  
20 trial, but they don't have those names.  
21 THE COURT: Right. I think the name issue, that's  
22 resolved through a prior order.  
23 Mr. Cline, do you disagree with that?  
24 MR. CLINE: I do, your Honor.  
25 THE COURT: Go ahead then.

10:07:44 1 MR. CLINE: Because what we would want to do -- we  
2 haven't had discovery. What we would want to do is with  
3 Mr. Abbey on the stand, Mr. Abbey, what's your name, if  
4 things were to go the way we would want them to go, he would  
5 answer that question and tell us his name and then we  
6 would --

7 THE COURT: But I have already said you're entitled  
8 to that information in a prior order. Why doesn't that  
9 dispose of that?

10 MR. CLINE: Because there is a difference that I  
11 was getting at when we spoke at the status conference.

12 THE COURT: On the different standards?

13 MR. CLINE: There are two different standards that  
14 I think are appropriate under the Roviaro standards for  
10:08:26 15 discovery classified information.

16 We respectfully disagree with the way that you applied  
17 the standard. I think the standard that is correct for  
18 discovery, when you're talking about the admissibility of  
19 evidence at trial, that's what we're now discussing for this  
20 purpose of the CIPA motion. The materiality requirement is  
21 in play. That's what the Libby case says that we cited at  
22 the status conference. What Libby says -- this is our  
23 position, that when you're seeking discovery of classified  
24 information under Rule 16 or the business materiality  
25 requirement that's sort of qualified privilege for the

10:09:12 1 government, but when you're talking about the admissibility  
2 of evidence at trial, that doesn't apply. All you are really  
3 talking about is the Rules of Evidence, Rule 401, 403 and so  
4 on.

5 To finish the point, when the materiality standard drops  
6 out, and all you're talking about is relevance, I think  
7 everybody agrees that name and age are -- for that matter are  
8 relevant.

9 THE COURT: We found relevance in that discovery  
10 order. We just found you weren't entitled to names.

11 MR. CLINE: Our position is, your Honor, that under  
12 the Rules of Evidence under cases like Libby, once relevance  
13 is established it is fair game at trial. There is no  
14 privilege.

10:10:02 15 THE COURT: I'll just cut this short.

16 I disagree with that. You're not going to get the name  
17 at trial. We can apply the other standards, get an order  
18 out, but I'm not going to give you the names. So we can  
19 short circuit that discussion. That's been resolved in my  
20 mind, and we're not going to change our ruling.

21 I don't know why I would say you can't have it in  
22 discovery, but, yes, you can have it at trial and use it. It  
23 just wouldn't have made any sense to have issued that first  
24 order. So I'm not going to give you that information.

25 You have asked for other information. Let's move on to

10: 10: 36 1 that.

2 MR. CLINE: All right. The other information we  
3 ask for is somewhat speculative. My co-counsel may have  
4 particular things that they have in mind, but we don't know  
5 much about this man.

6 THE COURT: Right.

7 MR. CLINE: He's testifying as an expert. If he  
8 were an ordinary expert, we would of course have his name,  
9 and we would be able to investigate him. Lacking that what  
10 we would propose to do at trial is ask him the kinds of  
11 questions that we would want to be able to ask him -- or  
12 explore at pretrial. That is, details about his training,  
13 details about his education, details about the prior work  
14 that he's done.

10: 11: 18 15 THE COURT: Did any of that come out in the first  
16 trial?

17 MR. CLINE: Some, but not much. We were all  
18 treading very lightly because we were very concerned about  
19 creating a problem. He testified a little bit about his  
20 background. He has a law degree from Tel Aviv University.  
21 He works for the Israeli Security Agency. He worked on a  
22 particular case that he talked about. He talked a little bit  
23 about his -- how he came to have knowledge about the issues  
24 that he was testifying about. But there was not a lot of  
25 detailed cross about, you know, his training, his education,

10:12:02 1 his background, his affiliations.

2 I mean, hypothetically, for example, if he were part of  
3 a settler group in Israel that would be very powerful  
4 evidence of bias. We would want to bring that out. We  
5 didn't get into that kind of thing in the first trial, I  
6 think because everybody was walking on egg shells.

7 MR. JONAS: Your Honor, this is Barry Jonas.

8 If I recall correctly, there was one point during Avi's  
9 testimony when we were on a break that Mr. Cline raised an  
10 issue similar to this, but very specific -- it was -- it was  
11 in regard to his rank in the military. Most Israeli citizens  
12 are required to serve in the military.

13 Mr. Cline can correct me if I'm wrong on what happened,  
14 but Mr. Cline requested a hearing on the matter with Judge  
10:12:54 15 Fish, and we ended up resolving the issue by providing  
16 Mr. Cline with the information he needed.

17 I believe in -- with regard to part two of their notice,  
18 the government responded saying it was broad. We still take  
19 the position that it's broad.

20 Frankly, your Honor, if we can get specifics from  
21 Mr. Cline outside the course of this conference as to what  
22 they plan on asking, we can go back to the Israelis, provide  
23 them with the questions, say, okay, tell us what is off  
24 limits, what's out of bounds, what's in bound, and maybe we  
25 can narrow the focus on what your Honor would have to rule

10: 13: 30 1 on.

2 THE COURT: Okay. Would that apply then to at  
3 least number 2 and 3?

4 MR. JONAS: It would certainly apply to number 2.

5 As far as number 3, I do believe that some of this did  
6 come out in trial. Certainly rank came out.

7 Responsibilities came out. I don't believe compensation is  
8 relevant. I don't see how much he gets paid by the Israeli  
9 government, that their salary is an issue here.

10 MS. SHAPIRO: This witness was not paid for his  
11 testimony.

12 MR. JONAS: I'm sorry, your Honor, I assumed  
13 compensation was salary. I didn't assume -- maybe  
14 Ms. Shapiro is right, compensation is payment for testimony.

10: 14: 16 15 MR. CLINE: This is John Cline. I think any  
16 payment that he is receiving while he's in court for his  
17 services, whether that's salary or some other compensation,  
18 would be fair game.

19 He did testify, as I recall, last time that he was being  
20 paid a salary by the Israeli government.

21 THE COURT: But you didn't get into the amount?

22 MS. SHAPIRO: His testimony was that he was simply  
23 receiving his normal salary. His salary was not being  
24 suspended while he was testifying, but he received nothing  
25 additional.

10: 14: 52 1 THE COURT: All right. Well, setting aside the  
2 compensation issue then, Mr. Jonas, it sounds like 3 has  
3 already been provided -- was provided at the first trial.  
4 The rank and responsibilities.

5 MR. JONAS: Yes, sir, that's my understanding.

6 THE COURT: Mr. Cline.

7 MR. CLINE: Well, rank, I think, it was provided.  
8 The fact that he was receiving a salary was provided. I  
9 don't know -- I'm trying to recall whether any details about  
10 his position at the ISA -- I don't believe it did.

11 MS. SHAPIRO: It was at the Daubert hearing he  
12 testified about that.

13 MR. CLINE: In any event, if the government is  
14 telling us that those areas -- the areas in topic 3 are not  
10: 15: 42 15 classified or problematic, then that's an issue that we don't  
16 need to trouble ourselves with. It's all mixed up with  
17 classified through this process.

18 MR. JONAS: This is Barry Jonas.

19 To a certain extent, and I'm speaking without knowing  
20 the details, but, for example, if you question Avi or Major  
21 Li or about the Israeli defense forces, about matters they  
22 worked on that is completely irrelevant to their testimony, I  
23 think those are irrelevant and out of bounds.

24 So I think as long as the questioning is somewhat  
25 relevant either to probe their knowledge of the subject

10: 16: 24 1 matter of the testimony, it's my understanding -- and,  
2 Ms. Shapiro, correct me if I'm wrong, but if the rank issue  
3 and the responsibility issues came out at trial, that should  
4 be okay.

5 MS. SHAPIRO: It did. Mr. Jonas is correct. As  
6 long as it's specific as to his testimony, if he testified  
7 about it you can, if it's just generally his responsibilities  
8 with respect to anything, that's likely going to cause  
9 problems.

10 MR. TULLY: This is Daniel Tully. He is testifying  
11 as an expert, which does expand his personal knowledge as far  
12 as his expertise.

13 MR. CLINE: John Cline.

14 One thing I would add is that there may be areas of  
10: 17: 10 15 responsibility that are unrelated to the subject matter of  
16 his testimony, but which are relevant to show a basis, for  
17 example, purely hypothetically, if Avi as a member of the ISA  
18 has participated in Operation Defensive Shield, or if he has  
19 participated -- if he has participated in some particularly  
20 controversial action in Gaza, let's say, even though that's  
21 not related to the subject matter of his testimony directly,  
22 I think we would all argue that that should be put before the  
23 jury as evidence of bias.

24 So it doesn't -- I don't believe it could be defined  
25 quite so easily as the government suggests.

10: 17: 56 1 MR. JONAS: Your Honor, in that case -- Barry  
2 Jonas -- I think we can deal with number 3 the same as number  
3 2. If Mr. Cline or other defense counsel could provide us  
4 with specific subject matter of questioning of Avi or Major  
5 Lior on, we can go back to the Israeli government and we can  
6 discuss it with them in order to narrow down the issues that  
7 your Honor has to decide.

8 THE COURT: Mr. Cline, what about that?

9 MR. CLINE: Well, I guess I have two reactions to  
10 that.

11 The first is that the cross-examination becomes a matter  
12 of prescriptive questions and answers, I think some of the  
13 value -- a lot of the value of it is lost. So I object to  
14 that. I don't think that's the way the cross-examination  
15 ought to go. It ought to be free-wheeling exchange with the  
16 witness so the jury can really access his credibility.

17 Having said that, CIPA, in my view, by its nature hinges  
18 on the right to cross-examine. If the Court were to require  
19 us to do that, we will do it. Under CIPA we will provide  
20 Mr. Jonas with more detail.

21 MS. HOLLANDER: This is Nancy Hollander.

22 Judge, I would just like to say -- I don't disagree with  
23 anything Mr. Cline has said, but I would like to state for  
24 the record an objection that the government of Israel is  
25 basically deciding what our cross can and can't be on a kind

10: 19: 24 1 of question-by-question basis, which I think is  
2 inappropriate. THE COURT: I don't know that we're  
3 looking at a question-by-question basis. From what Mr. Jonas  
4 is saying it's probably looking for more specific areas of  
5 where you wanting to question, not necessarily specific  
6 questions.

7 I understand it gets pretty murky where you actually  
8 could be given what you're going to ask, but I don't think  
9 he's asking for a question-by-question preview of where  
10 you're going.

11 I understand the concern, Mr. Cline, that ordinarily you  
12 don't have to do this when you're going to cross-examine the  
13 witness. But we do have CIPA, so we have to deal with that.  
14 I can't just let you start questioning.

10: 20: 06 15 MR. CLINE: I understand, your Honor. That's why I  
16 worded it the way I did. I object to it. I think it  
17 infringes our cross-examination, but it is what the statute  
18 seems to call for.

19 THE COURT: Right. Any other thoughts on that  
20 issue from any defense counsel?

21 MS. CADEDDU: Your Honor, this is Marla Cadeddu.

22 I just -- I agree with both Mr. Cline and Ms. Hollander  
23 and I think all counsel will join in their objections for  
24 record purposes.

25 THE COURT: Certainly. Then you may each have

10: 20: 38 1 that. I think that's a good approach on it. I don't know  
2 that there is any good way around it. If someone can make  
3 another suggestion other than we'll just let you ask your  
4 questions, and the government can object, which I don't want  
5 to do that. If you have another suggestion, I would be glad  
6 to hear it now or sometime later, but for now I think that is  
7 the way we need to approach it with respect to number 2 and  
8 3.

9 I'll take under advisement that issue about the  
10 compensation, but with respect to the rank and  
11 responsibilities, rank apparently is not an area, but the  
12 area of responsibility seems to be some area -- one area  
13 where there is a disagreement in terms of how far can you go  
14 in asking questions there.

10: 21: 30 15 Then with respect to number 2, the same. If you will  
16 get with -- counsel can get with each other and maybe narrow  
17 down some of what it is you're asking for and then we can at  
18 least get the Israeli government's position on it.

19 I don't know that the Israeli government is going to be  
20 deciding the issue, but at some point is wanting to press it  
21 once we have a specific area where I can rule on it -- be in  
22 a better position to rule on it, I'll make a ruling on it,  
23 and then we can go from there. But I think that's a good way  
24 to start.

25 Any other thoughts on that with respect to number 2 and

10:22:14 1 3 on the defense motion?

2 MR. CLINE: Not from Cline, your Honor.

3 MR. JONAS: None from the government, your Honor.

4 THE COURT: Then number 4, the basis for the  
5 witnesses' opinions.

6 Now, was Major Li or an expert witness?

7 MR. JONAS: Major Li or is not.

8 THE COURT: This is purely about Avi.

9 Let me hear from you, Mr. Jonas, I have got the defense  
10 motion in front of me. I know -- I think I know what they  
11 are asking for.

12 MR. JONAS: Your Honor, prior to the last trial the  
13 government provided defense counsel with -- I believe it was  
14 a notebook or -- you know, I think it's best that Ms. Shapiro  
10:22:50 15 respond to this part only because Avi was Ms. Shapiro's  
16 witness, and with regard to the information provided to  
17 defense counsel prior to the trial she's going to be more  
18 clear on that than I am.

19 THE COURT: Okay. Ms. Shapiro.

20 MS. SHAPIRO: Right. We provided a large amount of  
21 material to the defense prior to his testimony. There was a  
22 sort of book-like binder of probably a couple hundred pages  
23 that the witness had compiled for himself. That was turned  
24 over.

25 He also detailed in his Daubert hearing and in his

10: 23: 30 1 testimony the basis for his opinion, all the various sources  
2 of information that he relied on.

3 In addition, the government turned over some 19 or more  
4 binders of information that the government of Israel had  
5 given to the United States government, and we turned over all  
6 of that to the defense as well. In fact, very early on in  
7 the discovery process.

8 MR. CLINE: Your Honor, may I ask a question just  
9 for clarification?

10 THE COURT: Yes.

11 MR. CLINE: Ms. Shapiro, are you -- by the 19  
12 binders, are you referring to title materials now, what we  
13 call the government of Israel governments?

14 MS. SHAPIRO: No. What we call the government of  
15 Israel documents.

16 MS. HOLLANDER: Was that the labeled binders?

17 MS. SHAPIRO: I'm not sure of what the labeling  
18 was. They were produced to you as they were given to us in  
19 binders that were labeled, I think, 1 through 19. I think  
20 there was an A, B, C at the end of -- towards the ends where  
21 19 was.

22 Those were different from Colonel Siegel's materials  
23 that were turned over as reports of supporting material.

24 MS. HOLLANDER: We had 21 binders.

25 MS. SHAPIRO: That must be including them then.

10: 24: 48 1 THE COURT: Okay. Then where are we? Where does  
2 that leave us with respect to number 4?

3 MR. CLINE: Your Honor, as I understand it, I think  
4 what Ms. Shapiro is saying is that everything that Avi is  
5 relying on is unclassified, and has been produced so, it's  
6 fair game.

7 I think that the reason for including this fourth  
8 category, I believe, is that we don't know quite where the  
9 lines are. We don't -- in other words, we have this material  
10 that the government has produced, but we may want to ask  
11 questions that are not encompassed in that material about did  
12 he consider this, did he consider that, what are the limits  
13 of the material, what is the context of the material, were  
14 there other materials that came with these materials.

10: 25: 46 15 In other words, has he selected these from a larger  
16 pool, what's in that larger pool. We just don't know whether  
17 if we ask those questions we're going to get into classified  
18 areas or not.

19 It's a -- particularly dealing with an expert where  
20 you're trying to test not only training and expertise, but  
21 also the basis for the opinion. That's the real problem.

22 THE COURT: Ms. Shapiro.

23 MS. SHAPIRO: Yeah. I'm not -- it's sort of a  
24 vague answer. I'm not sure how to counter it other than to  
25 say that the witness was very specific in his testimony that

10: 26: 24 1 he was not relying on any classified materials. So the  
2 basis -- the entire basis for his opinion is unclassified.

3 THE COURT: Well, then it sounds like, Mr. Cline,  
4 that you could ask those questions, and others like it that  
5 you were just asking about. This may be another area that  
6 you can speak with the government lawyers on about, and  
7 whatever areas you think you want to go into that you may  
8 have a concern about opening up or getting into classified  
9 material. That would be the only one that I would think you  
10 need to apprise them of, or apprise the Court about, because  
11 they're stating as far as they're not -- he's not relying on  
12 anything classified. So it sounds to me like open questions  
13 as far as that area would be permissible.

14 MR. CLINE: Well, your Honor, we will think about  
10: 27: 20 15 what the Court is suggesting, and Ms. Shapiro as well. We  
16 will see if we can make more concrete areas of concern. If  
17 we can't, we can include that with items 2 and 3. If we can,  
18 then it sounds like we do have a pretty open field on it  
19 then.

20 THE COURT: Anything else on that, Ms. Shapiro?

21 MS. SHAPIRO: I don't think so.

22 THE COURT: All right. Any other matters that we  
23 need to address?

24 MR. JONAS: Your Honor, this is Barry Jonas.

25 Again, just from a logistical standpoint with regard to

10:27:52 1 those two witnesses, your Honor, I'm not up to speed on the  
2 way things were handled.

3 THE COURT: Just vaguely. I have heard it from  
4 Judge Fish, but that's been a while back.

5 MR. JONAS: Okay. The courtroom was closed. Only  
6 family members were allowed in. The witnesses entered in  
7 from the prisoner entrance into the courtroom. They did this  
8 prior to the jury coming into the room so the jury didn't see  
9 where they came from. There was -- the whole trial  
10 Judge Fish had a camera set up that -- there was a video feed  
11 that went to the overflow courtroom, and I'm not sure if your  
12 Honor plans on doing that.

13 THE COURT: We are thinking about doing that.

14 MR. JONAS: Okay. That happens -- that's great.

10:28:34 15 The camera was turned away from the witness so that the  
16 overflow courtroom could not see Avi's or Lior's face. I  
17 believe -- and I'm sure counsel will jump on me if I'm  
18 wrong -- Judge Fish made a statement to the jury panel  
19 letting them know the witnesses are not testifying under  
20 their real name. And both had counsel -- had their own  
21 counsel from Israel. If there was a question that could  
22 possibly elicit a classified response, counsel was allowed to  
23 approach the witness, confer privately, and then the response  
24 would come either in the form of an answer, or I cannot  
25 answer that. I think that only happened one or two times.

10:29:20 1 But we would certainly ask that the same procedures be put in  
2 place.

3 THE COURT: All right. Those I remember -- other  
4 than having counsel, I don't know that I was aware of that.  
5 I don't remember, but the rest of it, I remember Judge Fish  
6 telling me that.

7 Mr. Cline, any thoughts on that?

8 MS. CADEDDU: This is Marlo Cadeddu.

9 There were a couple of occasions where the -- I mean, we  
10 would object to treatment of this witness any differently  
11 than anyone else, for the record, but as far as practically  
12 speaking, there were times when these people came and went  
13 through the prisoner entrance, and the jury was able to see  
14 them do that. It wasn't quite as -- I don't think it was  
15 done as carefully as it should have been.

16 So I would make the request that if the Court is going  
17 to follow that procedure that the Court make absolutely  
18 certain that the jury is out before the witness is moved in  
19 and out.

20 THE COURT: Okay. Why is that? What do you think  
21 that that causes?

22 MS. CADEDDU: Well, just I have a concern that the  
23 jury view the witness as being treated specially, and that  
24 there is some sort of safety concern or something with him  
25 being in the courtroom. And I think that raises issues that

10:30:34 1 are inappropriate by the jury.

2 MS. HOLLANDER: This is Nancy Hollander.

3 I think the witnesses not only have their lawyers, they  
4 have some kind of bodyguards. So that when they moved there  
5 was like a bunch of people. It just sets up a concern that  
6 the jury will think that there is fear. That's what we were  
7 concerned about.

8 THE COURT: Well, we'll certainly try to work with  
9 you on that on the breaks just if we can -- our practice, of  
10 course, is to allows the witnesses -- jury to leave first on  
11 the break. But if the witness finishes and it's not a break,  
12 just call that to my attention and we'll work with you.

13 MR. CLINE: John Cline.

14 One other thing. As I recall, I may be recalling this  
10:31:20 15 wrong, but as I recall, before the last trial the defense and  
16 the government had worked out a statement to be read to the  
17 jury to explain the circumstances of Avi's testimony and  
18 Major Lior's testimony.

19 THE COURT: All right.

20 MR. CLINE: I believe that Judge Fish deviated from  
21 that slightly. I don't recall the details of the deviation,  
22 but I do recall that was of concern to the defense.

23 All I would ask is that we have an opportunity to  
24 propose a slightly revised statement to be read, and we will  
25 try to get the government's agreement, but we -- I think we

10:32:00 1 did have a concern about the statement Judge Fish read.

2 THE COURT: Why don't counsel get together on that,  
3 and see if you can come up with something that you could  
4 agree to.

5 Any other issues?

6 MS. SHAPIRO: This is Elizabeth Shapiro.

7 One more detail with respect to the testimony.

8 That is Major Lior does not speak English, and he had to  
9 have interpreters next to him that he alternated. I guess  
10 there is a protocol. Every so many minutes they rotate.

11 And Avi speaks English, although not the best English in  
12 the world. He had an interpreter as sort of a backup who was  
13 next to him in case he couldn't understand a word that was  
14 asked in the question, or if he couldn't come up with a word  
15 in English for the response.

16 We went that way because the -- having an interpreter  
17 slows things up substantially. So by having him testify in  
18 English, it cut out that translation part of it. We would  
19 just ask that that protocol be followed.

20 THE COURT: All right. Mr. Cline or any other  
21 counsel on that?

22 MR. CLINE: I don't think we have any objection to  
23 that, your Honor.

24 THE COURT: Okay. We have done that before. I  
25 think ordinarily when we have witnesses that testify solely

10: 33: 22 1 through a translator, generally there are two, especially if  
2 it's a long testimony, so that they can take a break. And  
3 then I have had standby translators as well. So we can  
4 certainly work with that.

5 All right. Any other matters we need to address?

6 MR. CLINE: None from the defense.

7 MR. JONAS: None from the government.

8 THE COURT: Okay. Well, thank you. Just let us  
9 know whether we need to have another phone conference.  
10 Hopefully we will see everybody here on the 4th so that we  
11 can take up the issues then, specific rulings on specific  
12 issues that are remaining.

13 MR. CLINE: Very well, your Honor.

14 MS. SHAPIRO: Thank you, your Honor.

10: 34: 10 15 ---00---

16 C E R T I F I C A T E:

17 I, P. Sue Englewood RPR/CSR, certify that the foregoing  
18 is a transcript from the record of the proceedings in the  
19 foregoing entitled matter.

20 I further certify that the transcript fees format comply  
21 with those prescribed by the Court and the Judicial  
22 Conference of the United States.

23 This the 18th day of June, 2009.

24 /S/P sue Englewood

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26 P. SUE ENGLEWOOD RPR/CSR No. 1170  
27 Official Court Reporter  
28 The Northern District of Texas  
29 Dallas Division

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